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No. 95-1098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF COURT APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The credit reporting agencies' defense of the Second Circuit's ruling only underscores the irrational limitation that it imposes on the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681-81t. The credit reporting agencies agree that, under the Second Circuit's interpretation, the FCRA requires that consumers encourage the agencies to disseminate false information that damages their credit and reputation before the consumer can bring a claim under the statute. The impact of this interpretation is particularly stark in this case, where credit agencies' automated systems continued to list the erroneous debt as an undisputed obligation after the consumer provided the agencies with an affidavit and court orders showing that the entry was in error, and after the creditor notified the agencies that the entry was wrong.

The credit agencies' contention that the FCRA provides no relief for consumers confronted with such recurring errors highlights the need for review by this Court to resolve the division in the Circuits on the interpretation of the remedial provisions of the FCRA. In this reply, we first show that the credit agency's arguments that certiorari should be denied because the ruling below could be sustained on alternative grounds are inaccurate. The issues on which petitioner seeks review — whether the FCRA requires denial of credit as a prerequisite to a cause of action, and what is the correct standard for punitive damages under the FCRA — are squarely presented in this case. We then show that the credit agency's defense of the ruling below only confirms our point that the Second Circuit's construction of the FCRA renders the Act self-defeating and useless as a remedy where, as frequently occurs, credit agencies fail to correct recurring errors in their automated credit reporting systems.

I. THE QUESTIONS PRESENTED ARE SQUARELY PRESENTED IN THE RULING BELOW.

A. Despite Contrary Rulings By Other Circuits, The Second Circuit Ruled That Denial of Credit Is A Prerequisite To An Action For Actual Damages Under the FCRA.

There is no dispute that the Second Circuit's conclusion that denial of credit is a prerequisite to maintaining a cause of action for actual damages under the FCRA is in direct conflict with the Ninth Circuit's holding in *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (1995). Indeed, both of the credit agencies insist that *Guimond* is wrong, and argue that the Second Circuit's contrary statement of the law in this case is correct. *See* Equifax Opp'n at 15-16; Trans Union Opp'n at 11-12. There is no escaping the fact that these decisions directly conflict over the interpretation of an important federal statute, and that conflict can only be resolved by this Court.[1]

Equifax, however, repeatedly contends that the Second Circuit's statement that a consumer cannot maintain a cause of action absent proof that the error was communicated to others was not the basis for the decision below. *See* Equifax Opp'n at 1-2, 15, 20. Equifax argues that petitioner's claim was actually rejected for lack of proof of causation or damages. *Id.* at 8, 14, 20. The

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[1] The credit agencies also acknowledge that the Second Circuit's ruling is contrary to *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984), but dismiss *Stewart* as an unusual case because it involved a credit agency making use of its own credit report. *See* Trans Union Opp'n at 11 n. 7; Equifax Opp'n at 19. *Stewart*, however, did not need to adopt an unusual construction of the FCRA to conclude that the Act provides a cause of action for harms caused without the dissemination of erroneous information. Moreover, *Stewart* is in direct conflict with the credit agencies' contention that the FCRA can never be violated unless a credit agency has distributed a "consumer report" to third parties. *See, e.g.*, Equifax Opp'n at 15-16.

Second Circuit's ruling, however, shows that the court found petitioner's claims for lost opportunity and pain and suffering damages deficient only because it held that the FCRA requires proof that the damages are caused by dissemination of an erroneous report to third parties.

Indeed, the court acknowledged that Petitioner provided ample evidence that he had suffered anxiety and severe emotional distress. *See* App. at A8. But the Second Circuit rejected his claim for these damages because there was no evidence "that any potential creditor or other person . . . learned of any harmful information from [the credit reporting agencies]." App. at A9. In the same way, the court recognized that petitioner presented evidence that he was seeking to purchase a home and had sufficient resources to obtain a mortgage, but "refrained from making any credit applications in order not to tarnish further his credit history." App. at A10. The court held petitioner's claim for loss opportunity damages failed because he "presented no evidence that any potential creditor bank even received his credit report." App. at A11. The dismissal of both of these damage claims was based entirely on the Second Circuit's decision to reject *Guimond* and hold that damages are not recoverable under the FCRA unless they are caused by dissemination of the derogatory information to third parties.

Similarly, Trans Union argues that the Second Circuit's conflict with *Guimond* is irrelevant because Trans Union's conduct with regard to Mr. Cassella did not violate any provision of the FCRA. Trans Union Opp'n at 14. However, the Second Circuit specifically declined to endorse Trans Union's claims that its conduct was justified. To the contrary, the court noted that the district court's rulings on Trans Union's conduct were marred by factual errors, *see* App. at A3-A4, and emphasized that the appellate court did *not* reach the question of whether Trans

Union's conduct was appropriate under the FCRA. *Id.* at A6. The Second Circuit based its ruling *solely* on the conclusion that petitioner's damages were not recoverable under the FCRA.

Indeed, Trans Union's assertion that its conduct was "unassailable," Trans Union Opp'n at 5, is belied by the record. Trans Union received an affidavit and court order showing that the child support entry was inaccurate, received a formal statement of dispute, and even received instructions from San Diego that the entry was an error that should be deleted. Even Equifax cannot bring itself to support Trans Union's contention that it is appropriate for a credit reporting agency to continue to rely on automated computer entry in the face of such contrary evidence. Indeed, Equifax deleted the entry immediately after it received the same affidavit and court orders provided to Trans Union, and asserts that it would have deleted it again if it was aware that its automated system had restored the entry. Equifax Opp'n at 5, 25. Thus, the conflict between the ruling below and *Guimond* is squarely presented in this case, and should be resolved by this Court.

B. The Second Circuit's Ruling On Punitive Damages for Willful Violation Of The FCRA Is In Conflict With The Standard Announced By This Court in *Hazen Paper*.

The credit agencies make similar arguments against review of the Second Circuit's ruling on punitive damages, but these claims are equally lacking in merit. First, Trans Union argues that there is no material difference between the interpretation of the term "willful" adopted by the Second Circuit in this case, and the interpretation in *Hazen Paper Company v. Biggins*, 113 S. Ct. 1701 (1993). However, the "conscious disregard" standard employed by the Second Circuit in this case is identical to the standard that *Hazen Paper* held was inappropriate when it ruled

that a violation is willful if the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *Id.* at 1710. Indeed, this Court emphasized that proof of a willful violation does not require the proof of outrageous conduct that the Second Circuit demanded in this case. *Id.*

Equifax does not dispute that the standards used in this case and *Hazen Paper* are in conflict. Instead, it maintains that petitioner failed to preserve this issue on appeal. Equifax Opp'n at 23. This contention is erroneous. Petitioner challenged the denial of punitive damages on appeal. App. at A11. Equifax correctly notes that petitioner argued that the "conscious disregard" standard of *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987), was satisfied in this case. However, petitioner also argued that punitive damages were appropriate under cases affirming that a willful violation is established where the credit agencies show a "reckless disregard" for plaintiff's rights. *See Thorton v. Equifax, Inc.*, 619 F.2d 700, 705 (8th Cir.), *cert. denied* 449 U.S. 835 (1980) (quoted at page 38 of the Brief of Appellant). Although petitioner did not cite *Hazen Paper* on appeal, it is the presentation of the issue, not citation of a particular case, that is necessary to preserve an issue for further review. *See Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 100 (1991).

Finally, the credit agencies note that the Second Circuit is not alone in interpreting the "willfully fails to comply" language of 15 U.S.C. § 1681n to require an especially high standard of proof. *See* Trans Union Opp'n at 12 n.9. This is true, but it only underscores the necessity of review. The high standard imposed in these cases cannot be reconciled with this Court's holdings that Congress intended virtually identical language in the Age Discrimination and Employment Act of 1967 ("ADEA"), 29

U.S.C. § 626(b), to establish a less demanding standard. Both statutes establish similar two-tiered liability schemes for actual and punitive damages, and the FCRA was adopted just three years after the ADEA. Thus, this Court's conclusion that the term willful had acquired an accepted interpretation that was well-understood by the time Congress enacted the ADEA, *see Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-27 (1985), strongly supports the conclusion that Congress intended for this term to have the same meaning in the FCRA.

II. THE CREDIT AGENCIES' ARGUMENTS UNDERSCORE THE SIGNIFICANCE OF THE RULING BELOW.

The credit agencies' remaining arguments only reinforce our original point that the ruling below leaves consumers victimized by credit reporting errors without any rational remedy. Trans Union characterizes the situation presented here as "a routine matter," Trans Union Opp'n at 1. This characterization is accurate. Studies show that errors in credit reporting systems are frequent, and the errors often persist even after the consumer brings them to reporting agencies' attention.[2] However, Trans Union and Equifax do not dispute that the construction of the FCRA adopted by the Second Circuit leaves consumers facing this frequent problem without any recourse unless they deliberately injure their credit in order to bring a claim under the FCRA.

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[2] *The Consumer Reporting Reform Act of 1994*, S. Rep. No. 209, 103d Cong., 1st Sess. 3 (1993) (19 percent of consumer credit reports contain errors that could adversely affect the consumer's eligibility for credit); *The Consumer Reporting Reform Act of 1993: Hearings Before the Subcommittee on Consumer Credit and Insurance of the House Committee on Banking, Finance, and Urban Affairs*, 103d Cong., 1st Sess., S. Hrg. 80, 432 (1993) (consumers who complained to FTC had already complained to credit bureau, without satisfaction, for an average of 31 weeks).

Indeed, in this case the consumer took each step set forth in the FCRA to correct the error without filing suit — but each step proved futile. Mr. Casella notified the agencies of the error as provided in 15 U.S.C. § 1681i(a), and even provided affidavits and copies of court orders demonstrating that the debt had been satisfied. App. at A3. When Trans Union refused to delete the entry despite this information, Mr. Casella also provided a statement of dispute pursuant to 15 U.S.C. § 1681i(c), which Trans Union simply ignored. App. at A3-A4. Moreover, Mr. Casella's counsel had the creditor notify the credit agencies that the disputed entry was in error and should be deleted. App. at A27. Again, no action was taken.

Nevertheless, Trans Union maintains that Mr. Casella still did not have a cause of action, even after he had exhausted all other avenues to correct the error.[3] The only way for consumers like Mr. Casella to challenge a credit agencies' refusal to delete an erroneous entry, Trans Union maintains, is to apply for a home mortgage or other credit and be rejected. Trans Union Opp'n at 11. While this contention accurately describes the effect of the decision below, it demonstrates the devastating consequences that this ruling has on enforcement of the FCRA. Application for a home mortgage is a major undertaking that most consumers would

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[3] Indeed, Trans Union maintains that it had no obligation to delete the entry or acknowledge the dispute at all. *See* Trans Union Opp'n at 5-6. As noted in our petition, however, Trans Union's contention that it was entitled to accept the report from the creditor as accurate, despite the protest from the consumer and evidence to the contrary, has been repeatedly rejected by the lower courts, which have confirmed that the reporting agency's obligation to reinvestigate includes an obligation to evaluate and question the accuracy of disputed items. *See, e.g. Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993); *Swoager v. Credit Bureau of Greater Petersburg*, 608 F. Supp. 972, 976 (M.D.Fla. 1985). Moreover, Trans Union repeatedly fails to mention that it continued to report the debt at issue here even after the creditor notified it that the entry was erroneous and should be deleted. *See* App. at A27.

not, and should not, undertake where adverse credit reports would render the effort futile. Moreover, denial of such a credit application is reported by credit agencies as an indication that the consumer is not credit worthy. Thus, the ruling below requires that a consumer urge the dissemination of inaccurate, derogatory information, and add more adverse entries to his or her credit report, in order to challenge a reporting agency's refusal to correct an erroneous entry.

Equifax does not dispute that the child support entry in its report was erroneous and should have been deleted. Instead, Equifax argues that consumers like Mr. Casella are required to anticipate that credit agencies will repeat errors even after they are deleted, and must resubmit their challenges on the assumption that the credit agencies' automated systems will restore the erroneous entry. Equifax Opp'n at 5. Despite Equifax's assurances that another notice by Mr. Casella would have convinced it to permanently delete the error, the evidence shows that Equifax continued to report the error even after it received a notice from the creditor that the entry should be deleted. App. at A27.[4] Moreover, the FCRA contains no requirement that consumers submit multiple notices when credit agencies repeatedly make the same error. 15 U.S.C. § 1681i(a).

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[4] Equifax's assertions that the reappearance of the erroneous entry was "unexpected" and it had a "reasonable expectation that no future reporting by San Diego would occur," Equifax Opp'n at 25, are not substantiated by evidence. In the record below Equifax never offered any testimony to explain why it failed to block the entry from reappearing when it was first notified of the error. To the contrary, studies show that the reappearance of errors that were supposedly corrected occurs frequently, and is a major source of complaints against Equifax and other credit agencies. *See* Brief of Amici Curiae in Support of Petition for a Writ of Certiorari, at 6-7 (describing study of Federal Trade Commission complaints).

Most importantly, Equifax's argument about a second notification is beside the point because, under the Second Circuit's ruling, the number of notices sent to the credit agency is irrelevant. According to the court, consumers who refrain from applying for credit while the credit agency considers their second, third, fourth or even twentieth request to correct the error forfeit their rights under the FCRA and cannot recover damages for lost opportunities, nor for the humiliation and frustration caused by having to repeatedly revisit the same errors. Of course, consumers suffer real damages if they must forego employment or credit opportunities or must repeatedly confront false accusations in a credit report because a credit agency fails to correct an error when first notified. *See, e.g.,Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509 (5th Cir. 1982) (awarding $10,000 in actual damages for humiliation and mental distress where consumer had spent months urging the reporting agency to cure the error and succeeded only after bringing suit). Nonetheless, consumers who take the prudent course of not encouraging the publication of erroneous information are left without any recourse for these harms under the ruling below.

Thus, although the credit agencies resist our contention that the decision below presents an Orwellian nightmare for consumers confronted by computerized systems that repeatedly generate inaccurate reports, their arguments confirm the dilemma the decision below poses for consumers. The Second Circuit's paradoxical interpretation should be reviewed by this Court because it has a devastating effect on the ability of the FCRA to perform its most basic objective of protecting consumers against erroneous credit reports.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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